

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the matter of) WT Docket No. 94-147
)
JAMES A. KAY, JR.)
)
Licensee of one hundred fifty-)
two Part 90 licenses in the)
Los Angeles, California area.)

To: The Commission

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OCT 31 1997

PETITION FOR RECONSIDERATION

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

James A. Kay, Jr. ("Kay"), by his attorneys and pursuant to Section 1.106 of the Commission's Rules, requests that the Commission reconsider its Order, FCC 97-349, released October 2, 1997, denying an Appeal of an Order Denying Motion to Disqualify filed by Kay, as well as Kay's May 19, 1997 and August 21, 1997 letters requesting a Commission investigation of a possible violation of the Commission's ex parte rules.

INTRODUCTION

On March 26, 1997, Kay filed a Motion to Disqualify Presiding Officer, along with a supporting Declaration of Kay ("Motion"). The Presiding Officer, Richard L. Sippel ("Presiding Officer"), denied the Motion. See, Memorandum Opinion and Order, FCC 97M-52, released April 14, 1997 ("Sippel Order"). On April 15, 1997, Kay filed an appeal of the Sippel Order ("Appeal"). By Memorandum Opinion and Order, FCC 97-349, released October 2, 1997 ("Commission Order"), the Commission denied the Appeal.

ARGUMENT

The Commission must reconsider the Commission Order and conduct a further investigation regarding certain ex parte communications allegedly made in this proceeding due to

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new evidence presented herein. This new evidence, obtained after release of the Commission Order, indicates that additional ex parte communications, other than those previously known by Kay, may have been submitted to the Commission and/or the Presiding Officer by an interested party, all in violation of the Commission's ex parte rules (Section 1.1200, et. seq.). This new evidence negates the grounds relied upon by the Presiding Officer in the Sippel Order and the Commission in the Commission Order for concluding that no ex parte communications occurred and warrants reconsideration of the Commission Order and/or a further investigation to determine whether the Commission and/or the Presiding Officer received any ex parte communications in this proceeding. Any ex parte communications in this proceeding are significant because they may have influenced the Presiding Officer to the degree necessary to require his disqualification.

I. The Commission Rules Require Reconsideration Based on New Evidence

Section 1.106(a) of the Commission's Rules permits reconsideration of final Commission actions where facts previously unknown to petitioner and unrepresented to the Commission have been discovered. Such is the case in this proceeding.

After filing the Motion and the Appeal, Kay obtained a copy of a letter, dated July 17, 1995, from Gerard Pick, an interested party, to the Presiding Officer, regarding matters that the Presiding Officer is considering in the above captioned matter ("Letter No. 2," attached hereto as Exhibit A).¹ This letter is markedly different from the alleged ex parte communication that lead Kay to file the Motion ("Letter No. 1," attached hereto as Exhibit B). Letter No. 1 was on the

¹ The document was obtained at Sheriff's auction held in Los Angeles, California, on September 15, 1997.

letterhead of Gerard Pick, was signed by Ann Pick, and had its address and date partially obscured by a handwritten note. Letter No. 2 is on the letterhead of Century Communications Service (a company believed to be owned and operated by Gerard Pick), and contains a readily legible date and address. Therefore, Letter No. 2 constitutes new evidence, necessitating reconsideration of the Commission Order and further investigation of possible violations of the Commission's ex parte rules.

II. Letter No. 2 Contains Information Which Necessitates Reconsideration of the Commission Order

The Presiding Officer's denial of the Motion to Disqualify and the Commission's subsequent denial of the Appeal were both based, in part, on the fact that a portion of Letter No. 1 was illegible. There are such problems with Letter No. 2, thus negating part of the basis for the Commission's prior finding, and necessitating reconsideration of the Commission Order and/or an investigation concerning whether Letters No. 1 and/or 2 were received by decision-making personnel of the Commission.

The Presiding Officer based his denial of Kay's Motion, in part, on the fact that the address and date on Letter No. 1 were either partially or totally obscured. See Sippel Order, ¶¶ 2, 11, 12 ("[A]ddressed to an indecipherable name . . . addressee is not decipherable . . . the letter cannot even be identified as having been addressed to the Presiding Judge by name"). Letter No. 2 is fully legible, clearly addressed to "Richard Sipple" [sic] in "Washington D.C." The Commission similarly noted the absence of a proper and complete date and address as factors in ruling that Letter No. 1 was not an illegal ex parte communication. See, Commission Order, ¶¶ 10, 11 ("[W]ith the balance of the name covered by the handwritten note"). The Commission,

noting that Letter No. 1 was on Gerard Pick's personal stationery, was signed by Ann Pick, and was partially obscured, decided that Letter No. 1 could not have been presented to the Presiding Officer. Id. Letter No. 2 is on the stationery of Gerard Pick's firm "Century Communications Service," is not signed by Ann Pick, and contains an unobscured address and date. Most significantly, Letter No. 2 is clearly addressed to "Richard Sipple" [sic] at the "Federal Communications Commission" in "Washington D.C."

If Letter No. 2 had been initially before the Commission, the Commission could have inferred that, based on the date, the address, and the stationery, an ex parte communication occurred. It was the absence of these factors in Letter No. 1 that allowed the Commission to conclude that Letter No. 1 was not an ex parte communication. Given this new evidence, the Commission must revisit this matter to decide whether Letter No. 2 constituted an ex parte communication, or, at a minimum, to conduct an investigation as to whether its ex parte rules were violated. Since the grounds for denial enumerated by the Presiding Officer in the Sippel Order and the Commission in the Commission Order have now been removed, Kay's production of Letter No. 2 necessitates reconsideration of the Commission Order and investigation into the Commission's receipt of these or any other any ex parte communications.

III. Reconsideration and/or Investigation Are Proper Because This New Evidence May Show Bias on the Part of the Presiding Officer

Ex parte communications by interested third-parties are clearly prohibited under Section 1.1208 of the Commission's Rules. A finding of bias on the part of a Presiding Officer may stem from ex parte communications to the Presiding Officer, leading to his disqualification. Because of the significance of ex parte communications in determining whether bias exists, and the fact

that Kay, to date, has been denied prior opportunities to investigate any ex parte communications, the Commission should reconsider the Commission Order and/or conduct an investigation surrounding its receipt of ex parte communications.

Section 1.245(b) of the Commission Rules states that bias is a factor in considering disqualification of a Presiding Officer. These rules exist because “[a]voiding even the appearance of impropriety is as important to developing public confidence in the judiciary as avoiding impropriety itself.” United States v. Hollister, 746 F.2d 420, 425 (8th Cir. 1984). Bias may surface where “[the decisionmaker] has in some measure adjudged the facts . . . in advance of hearing [the case].” Metropolitan Council of NAACP Branches v. Federal Communications Commission, 46 F.3d 1154, 1164-65 (D.C. Cir. 1995), quoting Cinderella Career and Finishing Schools, Inc. v. FTC, 425 F.2d 583, 591 (D.C. Cir. 1970). Such prejudgment and bias can arise from extrajudicial communications which “‘result in opinion on the merits on some basis *other than what the judge learned from his participation in the case.*’” Black Television Workshop of Los Angeles, Inc., 6 FCC Rcd. 2845 (1991) (emphasis added), quoting United States v. Grinnell Corp., 384 U.S. 563, 583 (1966).

Ex parte communications may lead to such a “prejudging” of the merits of a case, creating bias and necessitating recusal or disqualification. See, e.g., Liteky v. United States, 114 S.Ct. 1147, 1157 (1994) (finding ex parte communications are a factor in determining whether disqualification or recusal of a judicial figure are proper). Because of this possibility, it is

imperative that an investigation into Letter No. 2 and any other potential ex parte communications be undertaken by the Commission.²

Kay has attempted to obtain information concerning the Commission's receipt and disposition of certain ex parte communications on his own by repeatedly requesting relevant documents by use of the Freedom of Information Act ("FOIA"). Kay has submitted these requests in the hope of determining whether the Presiding Officer received any ex parte communications in this proceeding. Kay's FOIA requests, however, have been repeatedly denied. Therefore, it is imperative that the Commission, itself, undertake such an investigation in order that this case be conducted without any taint of improper ex parte communications.

CONCLUSION

WHEREFORE, for the reasons set forth above, Kay respectfully requests that the Commission reconsider the Commission Order, conduct an investigation concerning its receipt of any ex parte communications, and grant such other and further relief as is just and proper.

² A governmental agency's failure to consider all "relevant factors," such as a decision maker's receipt of an ex parte communication, in that agency's decision, can render that decision arbitrary and capricious, and violative of substantive due process. Burlington Truck Lines, Inc. v. United States, 371 U.S. 156 (1962).

Respectfully submitted,

JAMES A. KAY, JR.

By: 

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Dated: October 31, 1997

CERTIFICATE OF SERVICE


I hereby certify that a true and correct copy of the foregoing James A. Kay Jr.'s Petition for Reconsideration was hand-delivered on this 31st day of October, 1997 to the following:

John I. Riffer, Esq.
Administrative Law Division
Office of the General Counsel
Federal Communications Commission
Room 610
1919 M Street, N.W.
Second Floor
Washington, D.C. 20554

Gary P. Schonman, Esquire
Federal Communications Commission
Wireless Telecommunications Bureau
Enforcement Division
Suite 8308
2025 M Street, N.W.
Washington, D.C. 20554

and sent via first-class mail, postage prepaid on this 31st day of October, 1997 to:

William H. Knowles-Kellett, Esquire
Wireless Telecommunications Bureau
1270 Fairfield Road
Gettysburg, Pennsylvania 17325-7245.



Scott A. Fenske

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CENTURY COMMUNICATION SERVICE

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THE HON. L. RICHARD SIPPLE
Administrative Law Judge
Federal Communications Commission
1270 Fairfield Road
Gettysburg, PA 18325

717/537-1311 (702/632-7000)

(1919 M Street)
(Washington, DC)

17 July 1995

Your Honor -

There seems to be a convention that you don't write to a Judge.
There is also a convention that if you are about to drown you
grab at any straw.

Please, your Honor, read the enclosed. I know it sounds as if
I dramatize myself and my situation; nevertheless my family and
I are being systematically destroyed because we brought some im-
possible facts to the attention of the FCC. And the FCC is hurt
in the process.

It is the Kay case which is before you. And it radiates to the
monopolistic case/investigation before Judge Hogan in the United
States District Court for the District of Columbia. Please read
the papers attached hereto.

Respectfully -

/ac

Gerard Pick

GERARD PICK

6-SP(sipple)

THE HON. L. RJ
Administrative
Federal Commur
1270 Fairfield
Gettysburg, PA

Dear Bob

Your Honor -

*my husband passed away, he had
desperately to save us, but I am at the
end of the line. Kay is still saving us.*

There seems to be a convention that you don't write to a Judge.
There is also a convention that if you are about to drown you
grab at any straw.

Please, your Honor, read the enclosed. I know it sounds as if
I dramatize myself and my situation; nevertheless my family and
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States District Court for the District of Columbia. Please read
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Respectfully -

Arm Pick
Gerard Pick

/ac

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